IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/10/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM
AND
THE HONOURABLE MR.JUSTICE C.NAGAPPAN

C.A.No.1113 of 2002

R.Maruthamuthu .. Appellant

-vs-

State rep. by
Inspector of Police
Perambalur Police Station
Crime No.222/99 .. Respondent

This criminal appeal is preferred under Sec.374 of the Code of Criminal Procedure against the judgment of the Additional District and Sessions Judge cum Chief Judicial Magistrate, Perambalur District, dated 27.2.2002 in S.C.No.27 of 2001.

!For Appellant : Mr.S.Swamidoss Manokaran

^For Respondent : Mr.Jayaprakash Narayanan
Government Advocate
(Criminal Side)
:JUDGMENT

(Judgment of the Court was delivered by M.CHOCKALINGAM, J.)

The first accused in a case of murder, in which he stood charged under Sections 302 and 404 of Indian Penal Code along with the second accused, who stood charged under Sections 302 read with 109 and 404 read with 109 of I.P.C., on being found guilty as per the charges and awarded punishment of life imprisonment along with a fine of Rs.1,000/-, in default of which to undergo 6 months Rigorous Imprisonment, for the offence under Sec.302 of I.P.C. and Rigorous Imprisonment for two years along with a fine of Rs.1,000/-, in default of which to undergo Rigorous Imprisonment for six months for the offence under Sec.404 of I.P.C., has preferred this appeal. The second accused was acquitted of both the charges by the trial Court.
2. The short facts necessary for the disposal of this appeal are:
(a) P.W.1 Rengaraj, is the husband of the deceased Rani. They were living at Ammapalayam Village. They used to take the cattle for grazing. On the date of occurrence namely 3.3.1999 at about 3.00 P.M., she took her cow

for grazing. Till 5.00 P.M., she did not return. P.W.3 Narayanan, who belonged to the same place, was working at the field of one Poosigounder. At that time, the cow of the deceased got into the field. Immediately, he tied the same. At about 6.00 P.M., he returned with the said cow and informed P.W.1 about the same. When P.W.3 was proceeding, he found the accused sitting under a banyan tree. P.W.10 Radhakrishnan, who belonged to the same village, found the accused sitting under a karuveli tree. The next morning, P.W.1 was informed by a boy that the dead body of his wife was found near the bushes. P.W.1 accompanied by his relatives, went over to the spot and found the dead body of his wife in the bushes. They have also noticed that 7 + sovereigns of gold jewels marked as M.Os.1 to 5, were found missing. Then, P.W.1 went to P.W.4 Arjunan, Village Administrative Officer, and gave a report. P.W.4 recorded the same, which was marked as Ex.P1. Based on Ex.P1, he prepared a report Ex.P2.

(b) P.W.4 placed both Exs.P1 and P2 before P.W.9 Elangovan, Sub Inspector of Police, attached to Perambalur Police Station, who on the strength of which, registered a case in Crime No.222/99 against the accused under Sections 302 and 379 of I.P.C. The First Information Report Ex.P8 was despatched to the Court. On receipt of the copy of the F.I.R., P.W.12 Syed Mohamed, Inspector of Police, took up the investigation and proceeded to the spot. In the presence of witnesses, he made an inspection and prepared Ex.P3 observation mahazar and Ex.P15 rough sketch. The bloodstained earth M.O.6 and the sample earth M.O.7 were collected from the place under Ex.P4 mahazar. In the presence of witnesses and panchayatdars, he conducted inquest on the dead body of Rani and prepared Ex.P16 inquest report. Through a Constable, the dead body along with a requisition was sent to the Government Hospital for postmortem.

(c) On receipt of the requisition, P.W.7 Dr.Ganeshbabu, attached to the Government Hospital, Perambalur, conducted the autopsy on the dead body of Rani and found the following injuries.

External Injuries:

1. ILL defined abrasion seen encircling the neck above the hyoid bone, the abrasion becomes broken at the back of neck.

2. Abrasion 3 cm x 2 cm on the back of Right elbow, through which fluid blood oozing.
3. Abrasion in the back of left elbow 4 cm x 2 cm through which fluid blood oozing.
4. Abrasion left popliteal fossa 15 cm x 6 cm.
5. Multiple abrasions over the left thigh which extends to the lower part of left buttocks. 20 cm x 10 cm.
6. Multiple abrasions over the both scapular region 6 cm x 4 cm.
7. Abrasion on the both heel posterior aspect 6 cm x 3 cm.

The Doctor had issued a certificate Ex.P6 opining that the deceased would appear to have died of asphyxia 48-50 hrs before postmortem due to strangulation.

(d) On 13.6.1999 at about 15.00 hours, the first accused was arrested by P.W.13 Ramachandran, Inspector of Police, Padalur Police Station, at the time of the investigation in some other case. The accused volunteered to give a confessional statement, and the same was recorded, pursuant to which he took the police personnel to his residence, and from there M.Os.1 to 5 the gold jewels, were recovered under a search list. The said articles were sent to

Court. Apart from that, the accused was also produced before the Court. A-2 was also arrested and produced before the Court. P.W.14 Panneerselvam, Inspector of Police, took up further investigation. A requisition was forwarded to the Court for sending the material objects for chemical analysis. Accordingly, they were subjected to chemical analysis. Ex.P25 Chemical Analyst's report and Ex.P26 Serologist's report were received. On completion of the investigation, the Investigating Officer filed the final report, which was taken cognizance by the trial Court.

3. In order to substantiate the charges levelled against the accused, the prosecution examined 14 witnesses and relied on 26 exhibits and 11 material objects. On completion of the evidence on the side of the prosecution, the accused were questioned under Sec.313 of the Code of Criminal Procedure as to the incriminating circumstances found in the evidence of the prosecution witnesses. Both the accused flatly denied the same. No defence witnesses were examined. The trial Court on consideration of the rival submissions made and scrutiny of the materials, has found the first accused guilty as per the charges and awarded the punishment referred to above, but has acquitted the second accused. Hence, the first accused has assailed the judgment of the lower Court before this Court.

4. The learned Counsel appearing for the appellant made the following submissions:

The prosecution had no direct evidence in the case and had relied exclusively on the circumstantial evidence. The prosecution mainly relied on the identification of the first accused through P.W.3 and also the recovery of the jewels marked as M.Os.1 to 5, from A-1. But, the prosecution has failed in both. According to the prosecution, the first accused was arrested on 13.6.1999, and the requisition for conduct of the first identification parade was given after a period of 10 months. The first identification parade was conducted by P.W.11 Judicial Magistrate, on 27.5.2000. The proceedings pertaining to the same, marked as Ex.P11 would clearly indicate that P.W.3 could not identify the first accused, though he was shown not only once but also thrice. The second identification parade was conducted on 15.7.2000. At that time, P.W.3 identified the first accused. But, the second identification parade has taken place after a very long time from the time of arrest i.e., nearly one year and one month. This delay would be sufficient to reject the entire identification parade proceedings. Apart from that, at the time of identification parade itself, the first accused has categorically stated to the Judicial Officer concerned that there were number of occasions when he was shown to P.W.3, and in particular before the trial Court, where the first accused was produced. P.W.3 was already known to him and a relative also, and hence, he has identified the first accused. Under the circumstances, the identification parade loses its significance in law.

5. Added further, the learned Counsel for the appellant that so far as the recovery relied on by the prosecution, is concerned, there is no recovery under Sec.27 of the Evidence Act at all. Even from the evidence of P.W.6, it would be clear that the place of arrest, confession and recovery would differ. Apart from that, so far as the recovery is concerned, a perusal of the document would clearly indicate that it was not a recovery mahazar; but, it was only a search list, and it would also be strengthened by the evidence of P.W.6, who has deposed to the fact that there was no recovery; but, it was only a search, pursuant to which the gold jewels were recovered.

Not even a mahazar has also been prepared in that regard. Under the circumstances, the prosecution cannot place any reliance on the recovery, and thus, the recovery alleged to have been made, loses its importance. Therefore, the prosecution has nothing to put forth before the lower Court. Despite the same, the lower Court has been carried away by the prosecution version that the appellant is involved in number of cases of same sort and has found him guilty, and hence, it has got to be set aside.

6. In support of his contentions, the learned Counsel for the appellant relied on two decisions reported in (1) 1999 SCC (CRI) 378 and (2) AIR 2000 SC 160.

7. In answer to the above, the learned Government Advocate (Criminal Side) would submit that it is true that the prosecution has no direct evidence; but, the prosecution has clinchingly brought home the guilt of the accused. P.W.3 has clearly pointed out in his evidence that he saw the accused sitting under a banyan tree. His statement has been recorded by the police under Sec.161 Cr.P.C., and the same was forwarded to the Court within a short span of two months. It is true that he could not identify the first accused at the time of the first identification parade, but has tendered his explanation that he could not do so due to his ill-health, and the same was convincing and that has also been pointed out by the lower Court. In the second identification parade conducted, he has clearly identified the first accused thrice, and hence, the lower Court has rightly relied on the identification of the first accused. Apart from the identification of the first accused by P.W.3, P.W.10 a villager and who was also a member of the Home Guard, has also identified the first accused before the trial Court, which has also been relied on by the lower Court.

8. The learned Government Advocate would further add that so far as the recovery of the gold jewels M.Os.1 to 5 was concerned, they, according to P.W.1, belonged to his wife. The accused has neither claimed these jewels as his nor disputed the fact that they belonged to the wife of P.W.1. Further, from the evidence of P.Ws.6 and 13, it would be quite evident that these jewels were recovered from the first accused, pursuant to the confession made by him. A scrutiny of the evidence of P.W.6 would clearly indicate that it was the first accused who gave a confessional statement recorded by the Investigating Officer, pursuant to which the gold jewels have been recovered. Under the circumstances, the lower Court was perfectly correct in drawing the presumption under Sec.114 of the Evidence Act that it was he who committed the heinous crime of murder, and hence, the defence version was rightly rejected by the trial Court. In view of these reasons, the appeal is bereft of merits, and hence, it has got to be dismissed.

9. This Court paid its full attention on the rival submissions made and had a thorough scrutiny of the prosecution case as well as the materials on record.

10. In the instant case, according to the prosecution, one Rani, wife of P.W.1, was murdered by tying a cloth on her neck, and thereby, asphyxia was caused, due to which she died. At the time of investigation, an inquest has been conducted by P.W.12, and after preparation of the report, a requisition was forwarded to the Medical Officer P.W.7, who has also conducted the autopsy on the dead body and has given the opinion that the deceased would appear to have died of asphyxia 4 8-50 hours before the postmortem due to strangulation,

as found in Ex.P6 postmortem certificate. It is not also disputed by the first accused either before the trial Court or before this Court that she died out of asphyxia due to strangulation, and thus, it would be quite evident that it cannot be disputed that she died on account of homicidal violence.

11. Now, the question that would arise for consideration would be whether the prosecution has proved the nexus of the appellant/first accused with the crime in question. In the instant case, the prosecution had no direct evidence to offer, and it relied only on the circumstantial evidence. In a case where the prosecution rests its case on the circumstantial evidence, it must not only place sufficient circumstances, but also prove in such a way that it makes a complete chain and without any mistake, and it also points to the hypothesis that it was none else, except the accused, could have committed the offence. After careful consideration of the facts, this Court is of the firm opinion that the prosecution has miserably fai led to prove the nexus between the first accused and the crime in question. The whole case of the prosecution rested mainly on the evidence of P.Ws.3 and 10, who were examined as to the identification of the appellant/first accused, and also on the alleged recovery made, pursuant to the confessional statement alleged to have been given by the appellant to P.W.13, in the presence of P.W.6.

12. So far as the identification of the appellant/first accused was concerned, the prosecution had examined two witnesses namely P.Ws.3 and 10. As regards P.W.3, his statement was recorded by the police and sent to the Court with a reasonable delay. In the instant case, the first accused was arrested on 13.6.1999. It is a matter of surprise to note that a requisition for the conduct of the identification parade in respect of the first accused was given by the Investigating Officer after a period of 10 months from the time of arrest. Following the same, the first identification parade was conducted by P.W.11 Judicial Magistrate, on 27.5.2000. At that time, P.W.3 was asked to identify the first accused. On all the three occasions, he could not identify. In this context, the explanation tendered by P.W.3 that he was not doing well that day and hence, he could not identify, is neither convincing nor acceptable. Added further, the second identification parade was conducted on a requisition made by the Investigating Officer, on 15.7.2000. This Court is able to notice from the proceedings of the second identification parade marked as Ex.P14, that P.W.3 was able to identify the first accused, after a long delay of nearly one year and one month, which would be suffice to reject the identification proceedings.

13. Apart from the above, the first accused even at the time of the identification, has complained to P.W.11 Judicial Officer that he was shown to P.W.3 earlier, and P.W.3 was also known to him, and one occasion, he was actually shown to P.W.3, who was sitting in the Court hall at the time when the other proceedings were going on, in order to identify him in this case. It is contended by the learned Counsel for the appellant that the Court has to give importance to this aspect of the matter. Taking into account the above circumstances, this Court is of the considered opinion that no legal significance can be attached to the identification parade conducted in this case.

14. The contention of the prosecution that P.W.10 has also identified the first accused before the trial Court, and that has got to be given importance cannot also be countenanced for the reason that according to the prosecution, P.W.10 is a man attached to Home Guard. At the time of his

cross-examination, he has categorically stated that he gave an oral statement to the police the very next day, when they came for an enquiry, but, his statement was not recorded. When a query was raised by the Court in this regard, the prosecution was unable to tender any explanation why such a statement was not recorded at that time. On the contrary, it is seen from the records that the statement of P.W.10 was recorded only in the month of September 2000 and was sent to the Court. Thus, there is a delay of 1 + years in recording the statement of the said witness. Had it been true that such a statement was given by P.W.10 to the police at the earliest, then, there could not be any impediment for the police to record so. That apart, the Court is able to notice delay in recording his statement and sending the same to the Court, and this inordinate delay remains unexplained by the prosecution. In such circumstances, no evidentiary value can be attached to the evidence of P.W.10. Hence, it can be held that there was no proper identification of the first accused before the trial Court.

15. The second aspect, on which much reliance was placed by the prosecution, was the recovery of M.Os.1 to 5 gold jewels, from the first accused. In the instant case, according to P.W.13, the confessional statement of the first accused was recorded at the time of his arrest at Chenjeri Diversion Road. But, according to P.W.6, the place of arrest is Aranarai Diversion Road. It is the evidence of P.W.10 that pursuant to the confessional statement, he was taken to the house of the first accused, from which place M.Os.1 to 5 were recovered. It is pertinent to note that P.W.6 does not whisper anything about any production of gold jewels by the first accused and the recovery; but, on the contrary, he would say that there was a search made, and the jewels were taken. It remains to be stated that no mahazar has been prepared; but, only a search list was made. The explanation of the Investigating Officer that there was no white paper available with him, and hence, he prepared a search list of the house is not convincing. Apart from that, the confessional statement has not been marked by the prosecution before the trial Court. So long as the confessional statement alleged to have been given by the first accused, is not marked by the prosecution, the same could not form part of the evidence. When the alleged confessional statement is not a piece of evidence, the prosecution cannot call the recovery as a recovery pursuant to the confessional statement made by the first accused, Under Sec.27 of the Evidence Act. On that ground also, the recovery loses its importance. Under the circumstances, the recovery part also cannot be relied on by the prosecution.

16. Therefore, it can be safely held that on both the aspects namely identification of the first accused and the recovery of M.Os.1 to 5, the prosecution has miserably failed. In the absence of both or either of those aspects, the prosecution cannot be said to have brought home the guilt of the accused. But, the lower Court has not considered these aspects of the matter and has found him guilty erroneously. Hence, the conviction of the appellant/first accused under Sections 3 02 and 404 of I.P.C. and the consequent sentence imposed on him by the trial Court, have got to be set aside, and the appellant is entitled to acquittal.

17. In the instant case, the gold jewels M.Os.1 to 5 have been placed before the trial Court, and the first accused has not claimed them as of his, and when P.W.1 came forward to state that those jewels belonged to his wife, the same was not disputed by the appellant. Hence, a direction is issued that

the gold jewels M.Os.1 to 5 have got to be returned to P.W.1 on his making a request to the trial Court.

18. In the result, this criminal appeal is allowed. The conviction and sentence are set aside, and A-1 is acquitted of the charges levelled against him. It is reported that A-1 is in jail in connection with this case. Hence, he is directed to be released forthwith unless his presence is required in connection with any other case.

Index: yes
Internet: yes

To:

1. The Additional Sessions Judge cum Chief Judicial Magistrate, Perambalur.
2. The Principal District and Sessions Judge, Perambalur.
3. The Superintendent, Central Prison, Chennai.
4. The Public Prosecutor, High Court, Madras.
5. The Inspector of Police, Perambalur Police Station.

nsv/